No. 87-1279

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS
and CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR ADDITIONAL TIME FOR ORAL ARGUMENT AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT BY LAWRENCE E. WALSH, INDEPENDENT COUNSEL, AS AMICUS CURIAE

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March 18, 1988

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Lawrence E. Walsh, Independent Counsel, respectfully moves for one hour of additional oral argument time in the above-captioned case now scheduled for argument on Tuesday, April 26, 1988, pursuant to Rule 38.3 and Rule 42, and for leave to argue orally for 15 minutes of that additional hour, pursuant to Rule 38.7. Mr. Walsh has separately filed a motion to file a brief *amicus curiae* and a brief *amicus curiae* in this case, and has conferred with

appellant Morrison, who will be moving separately for additional oral argument time but has withheld her consent to sharing such time with Independent Counsel Walsh.

I.

In support of his motion for one hour additional oral argument time, Mr. Walsh submits that the importance and complexity of the issues in this case and the public interest in their correct resolution warrant such additional time, just as an additional hour was granted for oral argument in *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), and in *INS v. Chadha*, 462 U.S. 919 (1983). In those cases, as in this one, the Court was asked to hear multiple arguments on matters bearing on the separation of powers; the instant case as clearly warrants a full additional hour. Finally, Mr. Walsh understands that only three hours of argument have been scheduled for April 26, so that the hour requested herein could be added within the constraints of the Court's current schedule.

II.

In addition, Mr. Walsh seeks leave to participate in oral argument through his counsel of record because application of the independent counsel statute in the Iran/Contra matter raises issues which are distinct to this independent counsel and may well be affected by the disposition of this appeal but which were not addressed by the court below, are not directly implicated by the investigations conducted by Independent Counsel Morrison or any other independent counsel, are not discussed by appellant or by any of the other *amici* filing in support of appellant, and thus may not be fully and fairly canvassed unless such participation by this independent counsel in particular is allowed.

1. The independent counsel statute contains two distinct criteria pursuant to which the Attorney General

may initiate the appointment of an independent counsel: 28 U.S.C. § 591(b) requires the appointment of an independent counsel in certain matters involving specified high government officials, while 28 U.S.C. § 591(c) provides that the Attorney General "may" call for an independent counsel in other matters "if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." The instant appeals relate to an independent counsel appointed under § 591(b), while Mr. Walsh was appointed under § 591(c). He is the *only* independent counsel so appointed since the enactment of the statute in 1978 and is therefore in a unique position to address the significance of § 591(c) both in itself and in its implications for the Act as a whole.

2. The majority opinion below drew no distinction between independent counsel appointed under § 591(b) and those appointed under § 591(c). Yet both sections would succumb if the lower court's wholesale invalidation of the statute were upheld, inasmuch as neither section conforms to the demand of the court of appeals that all federal investigations and prosecutions be conducted by presidential appointees who serve at the will of the President. In neglecting to analyze or even acknowledge the difference between the two sections, the court below failed to recognize an important argument in favor of upholdng the statute as a whole—an argument perhaps less apparent when attention is focused on § 591(b). When the Attorney General relies upon § 591(c) in initiating the appointment of an independent counsel as he did in the Iran/Contra matter, the appointment of such a counsel is in no sense compelled by the independent counsel statute, but rather represents a voluntary decision by the Executive Branch to avail itself of the mechanism provided by that statute to guarantee the independence and integrity of a specific criminal investigation as to which

the Department of Justice may have a conflict of interest. The statute thus spares the Attorney General from supervising prosecutions in cases in which he himself acknowledges a conflict of interest. A statute that facilitates the credible functioning of the Executive Branch in this manner is harder to dismiss as intruding fatally upon the prerogatives of the Executive than it might be if the statute's facilitative role were less apparent.

3. Indeed, it is primarily by analyzing the role of the independent counsel statute in facilitating the impartial and credible discharge of the Executive's law enforcement functions, rather than by concentrating solely on whether the statute impermissibly intrudes upon the Executive, that one can most readily appreciate (a) the analogy between the independent counsel statute and other forms of conflict-of-interest legislation, and (b) the textual basis for all such legislation as a means of "carrying into Execution" the law enforcement "Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18 (Necessary and Proper Clause).

4. Mr. Walsh's participation in oral argument would also assist the Court in its consideration of this case because, unlike Independent Counsel Morrison, Mr. Walsh received a parallel appointment as Independent Counsel in the Iran/Contra matter pursuant to the Attorney General's independent counsel regulation, 28 C.F.R. §§ 600, 601 (1987).* Mr. Walsh is thus in a position to address directly the claim that the prospect of *ad hoc* appointment as independent counsel in the Department of Justice by the Attorney General, with solely regulatory rather than statutory tenure, solves the problems to which the independent counsel statute is addressed.

* Even though the validity of Mr. Walsh's parallel appointment has been upheld, *see In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S.Ct. 753 (1988), it is already apparent that the attacks on Mr. Walsh's authority in the Iran/Contra matter will continue unless and until the independent counsel statute is definitively upheld. For example, the Reply Brief of Petitioner in *North v. Walsh*, No. 87-1094, in which this Court denied certiorari on on February 22, 1988, 56 U.S.L.W. 3569, states (at p. 2) that "[t]he authority of respondent Walsh has not, however, been 'definitively upheld.'"

5. Moreover, the majority below made several explicit references to foreign policy and other supposed implications of the investigation by Independent Counsel Walsh, *see* App. 57a-58a, 72a-73a, 78a-79a, 80a-81a, even though none of the information relied upon by Judge Silberman in that regard was part of the record of this case.

6. Lacking any opportunity to file a reply brief to respond to whatever arguments are advanced in opposition to the perspective taken in the *amicus* brief of Independent Counsel Walsh, Mr. Walsh may be able to provide "assistance to the Court not otherwise available." Rule 38.7, if his office is granted leave to participate in the oral argument of this case.

CONCLUSION

For the foregoing reasons, the motion for additional argument time, and for leave to participate in oral argument, should be granted.

Respectfully submitted,

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